

# Comparing constitutions: Ideas, ideals, and ideology—toward a layered narrative

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*Comparing constitutions means having to cope with problems of understanding that which is unfamiliar and constructing a variety of texts. A layered narrative is a way to address these methodological and theoretical challenges. It starts from the assumption that the comparatist, while never able to see the whole picture, must nonetheless focus on seemingly marginal details. To capture the interaction between constitutions and cultures, the narrative has at its base a broad conceptual grid. The next layer is informed by four constitutional archetypes—the constitution as contract, manifesto, program, and law. In a more structuralist vein, the narrative analyzes the constitutional architecture dominated by a master plan whose elements are rights and principles, values and duties, organizational provisions, and rules for constitutional amendment and interpretation. While the elements of the master plan correspond to a global repertoire, their specific composition and distinctive details reflect the local knowledge that is crucial to the revitalization of comparative constitutional law.*

## 1. Doing comparative law

In the beginning of all comparative studies one reads. To be more precise, one constructs a reading of texts. What seems to be simple enough turns out to be somewhat more complicated when we look more closely at the construction of a reading: one reads texts that others—constitutional elites or advisers, the so-called framers—have written. And one also reads what others have written about those texts as glossators, commentators, scholars, legislators, or judges. And one then goes on to read what—again—others have written about those others who have written about texts others have written. And so on.

After reading, the comparatist writes. She constructs a writing of texts more or less on the basis of her readings. As she composes a text out of her readings of other texts, she has to cope with the “laws” of writing. In doing

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so, she “navigate[s] past the wrecks of a dozen sunken philosophies”<sup>1</sup> of comparative law, that is, goals, theories, and methodologies, as well as openly stated or cleverly hidden intellectual and political projects. Her writing is selective as she picks what she considers relevant, telling, fitting, or interesting for her comparative study, or what she perceives to be the same or, at least, similar, or as the opposite or different from the point of view of her own accustomed legal regime. Her writing is constructive as she arranges bits of information. Doing comparative law, one may conclude, implies the interpretation of information. Such interpretation is usually second or third order and, when based on other comparative texts, it may be fourth order or higher.

Comparative legal writers reconstruct a variety of texts. Some are called documents, others commentaries, yet others may be essays or treatises. These texts—like history or society, like the culture or law they deal with—do not turn an easily readable face to whoever wants to read and interpret, re- or deconstruct them. They are shot through with vague and obscure passages (mind that, according to Abbé Sieyès, arguably Napoleon and, interestingly enough, some of the American founding fathers, constitutions are supposed to be “short and dark”)<sup>2</sup> with contradictions and internal tensions, empty spaces and redundancies, tendentious commentaries, misleading dichotomies, and dangerous supplements. Legal and constitutional texts are, in a tricky way, *strange*. Strangeness may be the stuff of a good, mysterious, and exciting story, but, by the same token, it causes problems of understanding.

When comparing constitutions the comparatist is confronted with a specific genre of texts; moreover, constitutional documents bear a close relationship to politics and ethics—closer than most other laws. Therefore, they are permeated by ideas, ideals, and ideology.

Ideas can be described as knots of significations that “framers,” courts, and commentators have spun. These knots come under the guise of constitutional archetypes, patterns, structures, basic outlines, plans of action, or conceptions.<sup>3</sup>

<sup>1</sup> Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Cultures*, in CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 14 (Basic Books 2d ed. 2000) [hereinafter Geertz, *Thick Description*].

<sup>2</sup> Concerning the founding fathers, see Klaus von Beyme, Fischer's Move Towards a European Constitution, in Symposium: Responses to Joschka Fischer, Harvard, Jean Monnet Working Paper No. 7/00, [www.jeanmonnetprogram.org/papers/00/00f0201EN.html](http://www.jeanmonnetprogram.org/papers/00/00f0201EN.html). The origin of the dark-and-short requirement is rather obscure; Napoleon Bonaparte is reported to have required that the French Constitution and his Civil Code of 1804 be “*court et obscure*.” See Decision of the Regional Court in Munich, November 16, 2000, 2 Germ. L.J. No. 5 (Mar. 15, 2001), available at [www.germanlawjournal.com/article.php?id=58](http://www.germanlawjournal.com/article.php?id=58).

<sup>3</sup> THE SHORTER OXFORD ENGLISH DICTIONARY (Clarendon Press 1993), vol. I, 1303. I deliberately avoid the Platonic notion of an idea as an eternally existing pattern of any class, of which the individual members are imperfect copies.

Ideals capture the programmatic, utopian, or, at any rate, speculative visions believed to be enshrined in a constitutional document. They signify collective goals to be pursued, like maximum individual freedom or a high standard of equality, a “government of laws and not of men,” or a “people’s democracy,” a society progressing from capitalism to socialism—or, last but not least, “constitutionalism”<sup>4</sup> based on philosophical ideas.

Ideologies, if not designed as programs of collective action, are ideals turned sour but still upheld for the purposes of political domination, social exclusion, or the reproduction of social injustice. An ideology may also be defined as a system of ideas or a way of thinking that forms the basis for some political, economic, or constitutional theory that justifies actions and may be maintained irrespective of events and costs,<sup>5</sup> such as the ideology of a market economy, free from state intervention; a belief in strictly rational, expertise-based bureaucratic decision-making processes; the dictatorship of the proletariat; or, for that matter, the certainly less consequential ideologies of constitutionalism, thought to represent “the natural course of history”<sup>6</sup> and of neutral and objective comparative legal studies.<sup>7</sup>

Doing comparative law is demanding and difficult textual work, which can be or at least should be exciting. The comparatist appears an “intellectual nomad,”<sup>8</sup> bereft of a genuine field of law that could measure up when compared with contracts or criminal law. She is left with nothing but a questionable and, in the recent past, challenged method with which to handle the “explosion of fact” as it creates great piles of information. Wherever she may migrate and however much she may compare, at the end of the day she still has to settle with incomplete knowledge and less than total “cognitive control.”<sup>9</sup> She will never see the whole picture.<sup>10</sup> If that is

<sup>4</sup> NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM 10 (West 2003).

<sup>5</sup> Cf. THE SHORTER OXFORD DICTIONARY, *supra* note 3, at 1305.

<sup>6</sup> Daniel S. Lev, *Social Movements, Constitutionalism and Human Rights*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 139–141 (Douglas Greenberg et al. eds., Oxford Univ. Press 1993).

<sup>7</sup> For critical accounts of ideology, see Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850–1968*, 36 SUFFOLK U.L. REV. 631 (2003); ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (The Free Press 1976).

<sup>8</sup> See Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U. S. Comparative Law*, 46 AM. J. COMP. L. 43 (1998).

<sup>9</sup> Günter Frankenberger, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985) [hereinafter Frankenberger, *Critical Comparisons*].

<sup>10</sup> One of the founders of comparative law formulated the following rigorous scientific ideal: “The student of the problems of law must encompass the law of the whole world, past and present, and everything that affects the law, such as geography, climate and race, developments and events shaping the course of a country’s history—war, revolution, colonization,

so, and it seems to me that this presumption is hardly rebuttable, then what is called for is a selective and divergent process of reading, writing, and comparing that involves two steps. A careful tracing of the constitutional structures—notably human rights and organizational provisions—contained in the global repertoire comes first and comes easily, since what you will find appears in virtually any constitutional document. Next, the focus should be redirected to odd details, to what seem to be gaps or peculiarities that a standard reading might characterize as marginal stuff.

While most constitutional items, notably rights and values and various organizational provisions, are available in the transnational discourse on constitutional law, I contend that the nonstandard details are not part of the global repertoire. They cannot be purchased, so to speak, in the transnational supermarket for constitutional merchandise and, therefore, depart from the “global constitution.”<sup>11</sup> Whether they are exotic or banal, familiar or unfamiliar, they give away local information about contested concepts and social conflicts, identity struggles and fantasies of order and community.

Comparative legal studies also require operating with and within what Clifford Geertz referred to as “nets of meaning” and “webs of signification.” And once the comparatist begins to look at (constitutional) law not just as a body of norms but as “a view of the way things are,” as imaginations of reality—like science or religion, ideology or art—as well as an ensemble of “practical attitudes toward the management of controversy,”<sup>12</sup> she has to cope with translations of law and constitutions “between a language of imagination and one of decision.”<sup>13</sup> Guided by such a *constitutive* theory of law,<sup>14</sup> she will soon discard the fact/law and law-in-the-books/law-in-action

subjugation—religion and ethics, the ambition and creativity of individuals, the needs of production and consumption, the interests of groups, parties and classes.” Ernst Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung* [Purpose and Necessity of Comparative Law], in RHEINISCHE ZEITSCHRIFT FÜR ZIVIL- UND PROZEßRECHT 279–301 (1924), also in RECHTSVERGLEICHUNG [COMPARATIVE LAW] (Konrad Zweigert & Hans-Jürgen Puttfarken eds., Wissenschaftliche Buchgesellschaft 1978).

<sup>11</sup> For a more elaborate discussion of how constitutional models are constructed on the basis of the transnational or global repertoire, see Günter Frankenberg, *Verfassungsgebung in Zeiten des Übergangs* [Constitution Making in Times of Transition], in GÜNTER FRANKENBERG, AUTORITÄT UND INTEGRATION: ZUR GRAMMATIK VON RECHT UND VERFASSUNG [AUTHORITY AND INTEGRATION: THE GRAMMAR OF LAW AND CONSTITUTIONS] 115 (Suhrkamp 2003) [hereinafter, FRANKENBERG, AUTORITÄT UND INTEGRATION].

<sup>12</sup> Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in CLIFFORD GEERTZ, LOCAL KNOWLEDGE 167, 184 (Basic Books 1983).

<sup>13</sup> *Id.* at 174.

<sup>14</sup> Frankenberg, *Critical Comparisons*, *supra* note 9, at 447. For an elaboration of the constitutive theory, see Geertz, *Thick Description*, *supra* note 1; Geertz, *Local Knowledge*, *supra* note 12, at 167–219.

distinctions and deal, instead, with how she will represent in her scholarly work the legal representations of local conflicts, contexts, and visions.

## 2. On shortcuts, Cinderella, and Sleeping Beauty

In comparative law there is a lot to know, not only about laws and constitutions but also about their historical, cultural, political, and socioeconomic contexts. Within and without the texts and contexts, a great deal of darkness surrounds “the few bright spots,”<sup>15</sup> which renders understanding, analyzing, explaining, and comparing difficult—and interesting. Moreover, it is not at all clear how laws and constitutions relate to culture, society, and politics—and how culture, society, and politics relate to laws and constitutions—in one’s own and in other countries. Not surprisingly, comparatists seek shortcuts through the jungle of law, where they fear to meet “natives lying in wait with spears,”<sup>16</sup> as well as through the contextual jungle, where they come across strange traditions, organized interests, political ideologies, economic imperatives and the like.

Systems theory praises shortcuts as a reduction of complexity. Functionalism uses “function,” “solution,” and the presumption of similarity (between differing systems) as shortcuts. Positivists reduce the world of law to what they believe they see out there: legal norms and arguments, legal procedures and institutions. Rather than submitting to what these protagonists of the dominant comparative discourse may celebrate as a Hegelian *List der Vernunft*, as a cunning of practical comparative reason for coming to grips with the problems of knowledge, understanding, and explanation, I will describe briefly three rather popular shortcuts. These seem to involve fallacies that one may wish to avoid if comparative legal study, in its various forms, is to be emancipated from its fate as the “Cinderella of the legal sciences”<sup>17</sup> and from its still somewhat

<sup>15</sup> S. E. FINER, VERNON BOGDANOR & BERNARD RUDDEN, COMPARING CONSTITUTIONS 2 (Oxford Univ. Press 1995).

<sup>16</sup> Rabel, *supra* note 10, at 85. In light of this quotation, one might ask if “Eurocentric” adequately captures the perspective of its author, who certainly qualifies as one of the “masters of comparative law”; see David Gerber, *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Facade of Language*, in RETHINKING THE MASTERS OF COMPARATIVE LAW 190 (Annelise Riles ed., Hart 2001).

<sup>17</sup> HAROLD C. GUTTERIDGE, COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH 63 Cambridge Univ. Press 2d ed. 1949; for complaints about the lack of relevance of comparative law, see also BERNHARD GROSSFELD, MACHT UND OHNMACHT DER RECHTSVERGLEICHUNG [POWER AND POWERLESSNESS OF COMPARATIVE LAW] 13–22 (Mohr Siebeck 1984); Pierre Lepaulle, *The Functions of Comparative Law*, 35 HARV. L. REV. 838 (1922); and KONRAD ZWEIGERT & HEIN KOETZ, AN INTRODUCTION TO COMPARATIVE LAW 1–31 (Tony Weir trans., Oxford Univ. Press 3d ed. 1998).

marginalized situation in the curriculum of legal education. Those who nostalgically idealize the *Gruenderzeit* (founding era) of comparative law, with all its lofty ideals and daring projects, as a golden age might find it more appropriate to drop the Cinderella metaphor and replace it with the image of Sleeping Beauty so as to shift from the rags-to-riches association to a once-and-again perspective.

The *cognitivist* fallacy is based on the assumption that the world of law and constitutions is composed of mental phenomena that can be adequately and exhaustively analyzed by formal methods similar to those of mathematics and the natural sciences. This fallacy engenders the dream of a legal “physics” animated by systems and concepts, notions of unity and hierarchy, scientific laws of interpretation and other disciplinary norms. Such a dream, and the analogy it implies, inspires the fantasy of total cognitive control of the legal world and, more often than not, prompts the rejection of comparative legal studies as constructive and interpretive textual work. The overly cognitivist comparatist refuses to realize that she has become deeply entangled with the etiquette, conventions, and politics of a discipline—the discipline of comparative law—the boundaries of which are blurred, if not broken down.

The *functionalist* fallacy resembles the cognitivist fallacy by virtue of its search for “brute facts” and is, at times, celebrated as a “factual approach.”<sup>18</sup> The functionalist comparatist<sup>19</sup> picks a social problem, always already framed in terms of law, and then moves on to its legal solution. Overconfident that law is a self-contained and autonomous system of conflict management, she lets herself be guided by the question: “What legal norms, concepts or institutions in one system perform the equivalent functions performed by certain legal norms, concepts or institutions of another system?”<sup>20</sup> The functionalist presumption of similarity, which may be interpreted as “fear of otherness,”<sup>21</sup> implies that social problems and

<sup>18</sup> The most prominent example of this approach being the research enterprise “to unearth the common core of European Private Law,” see THE COMMON CORE OF EUROPEAN PRIVATE LAW: ESSAYS ON THE PROJECT (Mauro Bussani & Ugo Mattei eds., Kluwer 2002) [hereinafter THE COMMON CORE].

<sup>19</sup> Rabel, *supra* note 10, is generally considered the founder of functionalism. See also MAX RHEINSTEIN, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG [INTRODUCTION TO COMPARATIVE LAW] (Beck 2d ed. 1987); ZWEIGERT & KOETZ, *supra* note 17, at 32–47; Mary Ann Glendon, Rights in Twentieth Century Constitutions, 59 U. CHI. L. REV. 519, 535 (1992); and the bibliographical overview in David Kennedy, New Approaches to Comparative Law: Comparativism and International Governance, 1997 UTAH L. REV. 545.

<sup>20</sup> Walter J. Kamba, *Comparative Law: A Theoretical Framework*, 23 INT'L & COMP. L.Q. 485, 517 (1974).

<sup>21</sup> Curran, *supra* note 8, at 69, relates this fear to the experience of the German founding fathers of comparative law, Rabel and Rheinstein, who were forced into exile by the Nazi terror regime.

their legal solutions are easily readable facts—no matter where those problems may arise, no matter in which context those legal (or constitutional) solutions may have been produced. In her transnationally and cross-culturally transparent legal world, the functionalist secretly dreams of an “agenda of sameness,”<sup>22</sup> with the same problems and the same—or at least similar—legal solutions everywhere. Thus, she cultivates a superficial vision<sup>23</sup> of legal globalization that facilitates her dismissal of the constitutive theory of law and of local differences as well as of the more fundamental problem of *Fremdverstehen*<sup>24</sup>—the understanding strange laws of strange cultures. Unlike Wittgenstein and several ethnographers, functionalists pretend they always “see their feet.”<sup>25</sup> Moreover, functionalism, with its how-to bias of practiced law, is geared toward utilitarian results in its quest for better solutions—better, mind you, in the eyes of the beholder. This means that functionalists fling to the wind the warning that comparative law might be well advised not “to adopt as [its] own the sense of [the field] held by its practitioners, caught up as those practitioners are, in the immediate necessities of the craft”<sup>26</sup>—which is to say, solving cases. Ultimately, the vague concept of function operates like a magic carpet with which the comparatist shuttles from social problems to legal solutions and from one legal system to another—way above the “enigma of translation.”<sup>27</sup>

The *hermeneutic* fallacy is built upon a double reduction of the approach that focuses on the interpretation and better, that is, more authentic, understanding of the law and the cultural analysis of law. The first reduction leads to a reading of legal texts as moving and shaping only in one direction. Law appears only as a legislative or judicial script written for an instrumental purpose: to shape consciousness, to regulate human behavior, or to guide institutional operations. This view cuts off the notion of law as a

<sup>22</sup> Curran, *supra* note 8, at 61.

<sup>23</sup> Functionalism tends to be superficial, as even authors bent on defending mainstream comparative law against its (post)modern critics have to admit. See, e.g., Anne Peters & Heiner Schwenke, *Comparative Law beyond Postmodernism*, 49 INTL. & COMP. L.Q. 801, 827–828 (2000). For a persuasive critique of the *praesumptio* and an enlightened (re-)construction of the functional method, see Ralf Michaels, The Functional Method of Comparative Law, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., Oxford Univ. Press forthcoming 2006), available at [eprints.law.duke.edu/archive/00001249/](http://eprints.law.duke.edu/archive/00001249/).

<sup>24</sup> WERNER HAMACHER, *ENTFERNTES VERSTEHEN. STUDIEN ZU PHILOSOPHIE UND LITERATUR VON KANT BIS CELAN* [DISTANT UNDERSTANDING: STUDIES IN PHILOSOPHY AND LITERATURE FROM KANT TO CELAN] (Suhrkamp 1998).

<sup>25</sup> For a thorough critique, see Geertz, *Thick Description*, *supra* note 1, at 10–16.

<sup>26</sup> Geertz, *Local Knowledge*, *supra* note 12, at 233.

<sup>27</sup> The enigma is mentioned and then, somewhat naïvely, reduced to a matter of taking account of its possibility by John C. Reitz, in *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 620 (1998).

“moving hegemony,”<sup>28</sup> additionally shaped and driven by the understanding of law by legislators, judges, litigants, scholars, the mass media, and consumers of legal culture.<sup>29</sup> The second reduction divorces culture from law. While law is recognized as a social practice and, as such, is produced by and reflects culture, so the other side—law shaping culture—remains in the dark, as does the notion of law as an “‘active discourse,’ able by its own operation to produce effects.”<sup>30</sup> The hermeneutic fallacy, therefore, follows from a theory of law that is constitutive only in one direction and which denies the dynamic, dialectical law/power and law/culture relationship.

How can we reenergize comparative constitutional law, make it more interesting and less predictable, and thus move its theory and method from rags to riches and, by the same token, kiss awake the dormant ideas and projects? Whoever speaks of fallacies is obligated, as a result, to indicate how they may be avoided—even at the risk of falling into other traps. From what I have said before one may infer that whoever compares constitutions would be well advised to work as a legal scholar and to operate with the notion of a constructive comparative method and a complex constitutive theory, thus appreciating constitutions as shaping culture and culture as shaping constitutions. By connecting the constructive method with the constitutive theory I hope finally to come up with a *layered narrative*. Max Weber models ideal types; Freud diagnoses pathological symptoms and relates them to deep structures; Geertz offers a thick description of a few phenomena; and Derrida pays great attention to details, which he then deconstructs. A layered narrative suggests that all of this modeling, diagnosing, analyzing, describing, and deconstructing must be performed if Cinderella is to go to the ball or, for those who prefer the golden age vision, if Sleeping Beauty is to come to life again.<sup>31</sup> For obvious practical reasons and to avoid the illusion of one’s having a whole picture of all the constitutions of the world, less will have to do.

<sup>28</sup> See RAYMOND WILLIAMS, CULTURE AND SOCIETY 1780–1950 (Penguin 1963) and TOWARDS 2000 (Chatto & Windus 1983).

<sup>29</sup> Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, in CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW 1, 15 (Austin Sarat & Jonathan Simon eds., Duke Univ. Press 2003), referring to RAYMOND WILLIAMS, MARXISM AND LITERATURE 112 (Oxford Univ. Press 1977).

<sup>30</sup> Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, in 38 HASTINGS L. J. 814, 839 (1987); Naomi Mezey, *Law as Culture*, in CULTURAL ANALYSIS, *supra* note 29, at 45.

<sup>31</sup> The word “again” suggests that, once upon a time, comparative law, or at least comparative constitutional law, was quite alive when comparatists pursued a political project. This is the plausible argument David Kennedy makes in his critique of The Common Core Project of European Private Law, *The Politics and Methods of Comparative Law*, in THE COMMON CORE, *supra* note 18, at 131–197.

Claiming an “intellectual poaching license”<sup>32</sup> for comparative constitutional law, I intend (a) to point also at different, notably nonlegal, concepts of “constitution” and (b) to indicate different theoretical perspectives. Within each perspective a lot of modeling will have to be done to give contours to the various layers of the story. To render the descriptive, interpretive, explanatory, and deconstructive work at all feasible, the layers will have to be frozen, presented in slices, and then dealt with consecutively. Rather than aiming at one comprehensive, grand narrative about, say, “modern constitutionalism” or “the rise and fall of constitutions,” I intend to present several narratives—you might call them short stories—which, by virtue of their interaction, will weave a densely knotted narrative—an interaction that can only be hinted at, not elaborated in this article. Ultimately, the layered narrative is meant to keep at bay the necessities of the practitioners’ craft, to inspire further comparative research, and provoke intense criticism and debate.

### 3. Constitution as law and culture as constitution

“Constitution”—like nation, state, democracy, and sovereignty—is one of the central icons and also one of the most ambivalent ideological structures in the pool of cultural representations of modernity.<sup>33</sup> Most textbooks and articles devoted to comparative constitutional law do not expressly address the question “What is a constitution?” Rather than follow in the tracks of Carl Schmitt who, quite systematically, somewhat tediously, and ultimately in vain, attempted to nail down all possible meanings of the concept “constitution” in 121 pages,<sup>34</sup> today’s comparatists pragmatically settle on a couple of pages and meanings—or less.<sup>35</sup> They agree basically on the notion of constitution as a higher or supreme law. Highness is ascertained, technically, by the systematic ranking of constitutional norms at the top of the legal hierarchy, above the ordinary laws, and by the methodological rule that laws have to be interpreted in conformity with the constitution.

Genetically and conventionally, a constitution qualifies as law when it is produced by a lawmaking body, such as a constitutional assembly,

<sup>32</sup> Clyde Kluckhohn’s description of anthropology, quoted in GEERTZ, LOCAL KNOWLEDGE, *supra* note 12, at 21.

<sup>33</sup> Concerning modernity’s structures of ideological ambivalence, see NATION AND NARRATION, 1, 4 (Homi K. Bhabha ed., Routledge 1990).

<sup>34</sup> CARL SCHMITT, VERFASSUNGSLERE [THEORY OF THE CONSTITUTION] 1–121 (Duncker & Humblot 4th ed., 1965).

<sup>35</sup> Finer et al. attempt to solve the “what is” question with a concise definition: “Constitutions are codes of norms which aspire to regulate the allocation of powers, functions, and duties among the various agencies and officers of government, and to define the relationships between these and the public,” COMPARING CONSTITUTIONS, *supra* note 15, at 1.

convention, or the like, and then is adopted according to legally prescribed procedures, say, a referendum or parliamentary decision. What looks like a routine under the rule of law implies a paradoxical *creatio ex nihilo*: a people constitutes itself in performing the act of signing/underwriting/adopting a constitution as a free and independent people, which the constitution has *always already presupposed* as empowered to sign, underwrite, or subscribe to said constitution.<sup>36</sup> This self-empowerment of “We, the People,” or “We, the Nation,” belies the mystical basis of constitutional authority.<sup>37</sup>

Framers of constitutions try to solve or, rather, cover up the paradox with recourse to a specific constitutional style that seeks to remove constitutions from the world of normal lawmaking. Thus, unlike ordinary laws constitutions are not just passed but are “solemnly declared,” “proclaimed,” or even “ordained”—a semantic usage bestowing on them the aura of sacred documents. Moreover, constitution makers elevate the documents’ making and their legitimacy by invoking the presence of a transcendent authority: God and the Holy Church in the Magna Carta,<sup>38</sup> the Crown in the United Kingdom’s constitutional regime, the Holy Trinity and the Almighty in the Irish, Divine Providence in the United States Constitution, or “God, the source of all reason and justice” in the Argentine document. Somewhat toned down, the Framers of the German Basic Law claimed that they were “conscious of their responsibility before God.” Similarly, even if in a secular vein, the makers of socialist constitutions, such as the Chinese or Vietnamese, appeal to the authority of history, tradition, science, the Party, a “glorious revolution,” or, with the charm of vagueness, to “the requirements and tasks of the new situation.”

Highness is underscored by the language of the document, thereby characterizing its substantive content as consisting of inalienable sacred and natural rights or “humble obligations” (Ireland) and “lofty duties” (China again), or as sanctioning outright constitutional support for religion—the Catholic Apostolate in Argentina, and Islam in Afghanistan. At times even the formal construction of a constitution reveals the framers’ romance with a “higher,” preferably religious, authority. If not purposely intended, it seems like a more than happy coincidence that the number of amendments in the United States Bill of Rights nicely corresponds to the biblical Ten Commandments. Other constitutional documents move from sanctifying a particular historical experience in their preamble to the secular business of organizing government and guaranteeing rights.

<sup>36</sup> JACQUES DERRIDA, OTOBIOGRAPHIES: L'ENSEIGNEMENT DE NIETZSCHE ET LA POLITIQUE DU NOM PROPRE [OTOBIOGRAPHIES: THE TEACHING OF NIETZSCHE AND THE POLITICS OF THE PROPER NAME] 21–25 (Galilee 1984).

<sup>37</sup> Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 CARDozo L. REV. 919–1045 (1990).

<sup>38</sup> Arguably an early and rudimentary constitution.

A layered narrative can hardly settle on one conceptual layer—say, the conventional meaning of “constitution” as higher law. Since the layering begins with this concept, openness to the variety of meanings is called for, so that the comparatist may proceed from constitution as higher law to its related prescriptive aspects as an instrument of *governance* and *government* as well as a *charter* laying down the ground rules for social conflicts. From this triad—higher law, governmental organization, and ground rules—the reader of constitutions may learn a lot about the visions of order imposed by elites or desired and shared by the constitutions’ addressees. Most commonly, constitutions present variations on the theme of self-government and fantasies of a kind of domination where the subjective factor is magically neutralized—within a “government of laws and not of men.” Comparative constitutional law can tell fascinating stories about how the self is first elevated as popular sovereign and then reduced and fragmented within schemes of representation, delegation, and the transfer of power away from the collective self whose consent to being governed is always implied or invoked. Constitutional law can similarly tell stories about how conflicts between citizens and their governors and among citizens themselves are removed from where they arise, the public arenas, and transformed into controversies under constitutional law to be settled by constitutional or supreme courts.

Once comparatists move on to the *constitution as culture*, they transgress the borders of an instrumental understanding and begin to encounter the symbolic dimension—a dimension that is remarkably neglected by, if not altogether absent in, most writings on comparative constitutional law. That this should be so is probably because it forces the comparatist to leave the safe heaven of legal norms, of rules and principles, of cases and legal methods—in short, the world of justice—and to enter a terrain which stakes out “the collective ensemble of artefacts, practices, and spaces enmeshed in the production and dissemination of *meanings* and *knowledges*.<sup>39</sup> In this terrain—the realm of culture<sup>40</sup>—“the real” is imagined, constructed, and made sense of.

In the world of signs and symbols the so-called sacred texts are decanonized and placed in the context of the everyday world. Not only do cases and norms and juridical writings appear on the radar screen but also the ideas and actions of ordinary people, programmatic visions of social

<sup>39</sup> Jerry D. Leonard, *Introduction to LEGAL STUDIES AS CULTURAL STUDIES—A READER IN (POST)MODERN CRITICAL THEORY 3* (Jerry D. Leonard ed., State Univ. of N.Y. Press 1995).

<sup>40</sup> Concerning the concept of culture, see RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 76–82 (Fontana Press 1976); TERRY EAGLETON, *THE IDEA OF CULTURE* (Blackwell 2000); JOHN FROW, *CULTURAL STUDIES AND CULTURAL VALUE 3* (Oxford Univ. Press 1995); EDWARD W. SAID, *CULTURE AND IMPERIALISM* xii (Vintage 1994).

movements, group interests, and so forth. Informed by a constitutive theory, the comparatist regards constitutions as reflecting and shaping the everyday and, in particular, as reflecting and shaping the imagination of political unity and collective identity as well as offering a framework for ideology. Within this perspective it is crucial to view constitutions as not passively sitting "at the receiving end," operating as mere receptacles or reflectors of culture,<sup>41</sup> but to consider that they actively intervene and, under certain circumstances, shape or transform culture. Obviously, the relationship between culture and constitution is not a one-way street but works reflexively in both directions and, therefore, resists simplifications, such as the analogy to the all-too-simple model of regulatory law with its questionable mechanics of cause and effect. Whether and how constitutions palpably penetrate and effectively intervene in the realm of culture, offering a vehicle for a collective identity<sup>42</sup> and, thus, contributing to the creation of community, cannot be presumed but has to be analyzed. Whether and to what extent constitutions are integrated in the symbolic everyday depends on their popular appeal, readability, and age; similarly, whether or not they capture the people's utopian fancy and their desire for authoritative higher-law settlement, unification, and orientation remain open questions. Liberal constitutions, such as those of the United States, Italy, Germany, France, India, and others, usually keep aloof from notions of community and solidarity and make do, in passing, with a generalized "People" or the abstract "Nation." By way of contrast, socialist constitutions recast the atomized society of individuals or groups, nationalities or tribes, as the "people of all nationalities" or "the alliance of workers and peasants" (China, Viet Nam) or, even more counterfactually, as "working people" (North Korea). Similarly, constitutions of recently united countries tend to imagine the end of ethnic diversity and a unity above the fractured society of groups or tribes as a "civil society" (Afghanistan) or a "community" based on human rights (Germany).

The question of the transformative power of constitutions cannot be answered in general terms and need not be further discussed here. I merely want to put forward the claim that for comparative constitutional studies to

<sup>41</sup> MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (Harvard Univ. Press 1987) promotes the "expressivist" idea that law "tells stories about the culture that helped to shape it and which it in turn helps to shape." For a different view, see Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, in 108 YALE L. J. 1225, 1270–1271 (1999). More generally and in line with Montesquieu's approach, Cass Sunstein claims that constitutions must be "compatible with the culture and mores of those whom they regulate," *On Property and Constitutionalism, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY* 383, 398 (Michel Rosenfeld ed., Duke Univ. Press 1994). Concerning the problem of transforming a people's identity, see DORSEN ET AL., *supra* note 4, at 45–47.

<sup>42</sup> For a thorough debate of the function of constitutions as a framework for a collective identity see Armin von Bogdandy, *Europäische Verfassungspolitik als Identitätspolitik [European Constitutional Politics as Identity Politics]*, 38 KRITISCHE JUSTIZ 110 (2005).

generate more interest and to move from the margin to the center of the legal curriculum, they have to deal with both—constitutions as law and order as well as constitutions as culture and as the imaginations of community. Thus comparatists may cross the boundaries of a legocentrism<sup>43</sup> so prevalent in comparative law, with its pathetically narrow focus on legal norms and cases, legal processes and institutions.

## 4. Constitution making and constitutional archetypes

The higher-law concept implies that constitutions are law. This implication turns out to be both too narrow and too broad once we place a historical layer on the conceptual grid. In tracing and mapping the development of modern constitutions, and with some additional modeling, one may come up with four models defined by a distinct basic structure: constitution as contract (including social contract), manifesto, program, and law.<sup>44</sup> I refer to these models as archetypes<sup>45</sup> because their gestalt is represented—not altogether unlike Jungian archetypes<sup>46</sup>—on the symbolic level by documents. One should not place too much weight, however, on this analogy, as these archetypes rather than elucidating a “constitutional unconscious” merely capture and shape the transnational flow of constitutional imagination and the practice it informs. Thus, the archetypes qualify as specimen for copies and variations.<sup>47</sup>

The constitutional *contract* dates as far back as the Magna Carta, arguably one of the most cherished, yet overrated, founding documents of the modern constitutional era. This archetype, as we may call it, experienced a renaissance in the nineteenth century and very recently returned to the supranational level, notably in Europe. The early contractual model established a relationship between the monarch and the barons, presupposing membership of the contracting parties in one of the estates of the feudal order. Later contracts in other countries set up a relationship between independent political units, mostly states, within a newly constituted federal or confederate system of government under the sign of empire, federal republic, union, or “league of friendship.”

<sup>43</sup> Frankenberg, *Critical Comparisons*, *supra* note 9, at 445–453.

<sup>44</sup> The archetype of “constitution as law” is meant to characterize constitutions as the outcome of a (qualified) legislative process.

<sup>45</sup> For a more elaborated presentation of the archetypes, see FRANKENBERG, AUTORITÄT UND INTEGRATION, *supra* note 11, ch. III; and Günter Frankenberg, *The Return of the Contract*, 6 EUR. L.J. 257–276 (2000).

<sup>46</sup> CARL GUSTAV JUNG, THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS (Bollingen 1981).

<sup>47</sup> For the related, if sociological, term “ideal type,” see MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT [ECONOMY AND SOCIETY] (Mohr Siebeck 5th ed. 1980).

Typically, the contractual *pouvoir constituant* is not an imaginary commonality but a visible, internally structured plurality: “We, the Undersigned,” instead of “We, the People,” or the “We, the Nation.” Most constitutional contracts focus on the modalities of government. They limit the exercise of political power by placing an obligation on the central public authority to respect the rights of individuals or members of an estate or the competences reserved to the contracting parties and states. As organizational contracts, such as the Articles of the Federation in 1781 or the Imperial German Constitution in 1871, where “the five Majesties present . . . contracted an eternal alliance,” or the contract of the European Constitution, presently in limbo, they address rather straightforwardly the question of sovereignty, which they divide among the contracting parties and the newly created superior level of government, thus pooling political authority within a supranational regime.

In contrast to real as distinct from virtual organizational contracts, which span the whole conceptual grid from higher law to ideology, *social contracts* are neither prescriptive nor descriptive but dwell in the realm of theory and philosophy, where they serve as metaphors for the transformation of a state of nature (anarchy) into a social state (society), or of a “society of individuals” into an imaginary “body politic.” Such entities may be referred to variously as a civil society, *civitas*, or *État politique*, each based on an infinite number of virtual, reciprocal agreements. Framers or commentators have borrowed the philosophical idea of a social contract to elevate a constitution above the horizon of partisan interests and thus to dignify its contents.

The second archetype, the constitution as *political manifesto*, is epitomized by the French *Déclaration* of 1789. This *Déclaration* and its English predecessors, the freedom proclamations of the seventeenth century, as well as the Declaration of Independence and the Universal Declaration of Human Rights, arose from political struggles, revolutionary uprisings, liberation movements, and human catastrophes. As normative speech acts,<sup>48</sup> they turn the performative into a mere statement by claiming that they do not constitute but only confirm, declare, or reaffirm what is already beyond dispute and doubt: namely, what is—of course—common knowledge, such as the traditional rights of Englishmen; what are self-evident truths, notably “[t]hat all men are created equal”; what is evident, like “the history of repeated injuries and usurpations” on the part of the king of Great Britain; or what expresses a presumed political consensus—“that these united [New England] colonies are, and of right ought to be, free and independent states” or that monarchical “disregard and contempt for human rights have resulted in barbarous acts.” The confessional message of

<sup>48</sup> See Cornelia Vismann, *Das Recht erklären. Zur gegenwärtigen Verfassung der Menschenrechte [Declaring the Law: The Current State of Human Rights]*, 29 KRITISCHE JUSTIZ 360 (1996).

manifestos lends itself to narratives regarding the ends of government, the basis of a good society, or the glory of a revolution.

As distinct from contracts, manifestos are unilateral proclamations of elected, delegated, or self-styled elites who claim to have a special mission. Due to their historical context, they tend to address matters of substance and good governance: goals, shared values, and fundamental rights as common goods. They invariably document the result, closure, or summary of a foundational discourse.

With the rise of the contractual or statutory archetype, the manifesto does not altogether disappear from the constitutional stage but is submitted to the discipline and routines of higher lawmaking. As a rule, manifesto elements are relegated to the preambles, where they may provoke doctrinal debates concerning their nature as binding rules of law, or may be hidden in single constitutional provisions where they reappear under the guise of values.

“Real-existing socialism,”<sup>49</sup> not exactly a promoter of constitutional democracy, introduced the third archetype—the constitution as *program*. It comes as no surprise that this constitutional innovation was bound to join these authoritarian regimes on their way to the archives of history. Some, however, still exist as mementoes of a future that most likely never will be. Program constitutions translate the “laws of scientific socialism” and historical materialism into ideological blueprints for socioeconomic and political-cultural development. From a higher-law viewpoint they are dismissed as “façade constitutions.” Such a narrow and biased perspective, informed by liberal constitutionalism, misses the interesting stories program constitutions can tell us. They are not meant to serve as regulatory law, instruments of a limited government, or ground rules. Conflicts between citizens and the socialist “powers that be,” which would otherwise warrant civil rights, are inconceivable within the authoritarian type of socialism because it is always the people’s state that is acting. And on the way to that state, conflicts are neither visible nor admissible because they would disturb the prerogative of the “laws of socialism.” Hence, such constitutions only imitate semantically the higher-law style of western constitutionalism.

More importantly, program constitutions serve as positive ideology with a strictly symbolic purpose<sup>50</sup> in the socialist context. They offer a frame of reference for political unity and collective identity, and they mirror and project stages of progress along the guidelines provided by Karl Marx,

<sup>49</sup>This is the literal translation of a concept used by the protagonists of socialist regimes (*real existierender Sozialismus*) referring, after their fall, rather ironically, to authoritarian, Stalinist, or Maoist regimes of communism.

<sup>50</sup>For a more elaborated account, see Frankenberg, AUTORITÄT UND INTEGRATION, *supra* note 11, ch. IV.

V. I. Lenin, Mao Tse-tung, and other such authorities. Moreover, program constitutions tend to become obsolete and need revision, once the ruling cadres decide, on the basis of their superior insight into the laws of development and the authoritative scriptures, that a certain developmental stage has been reached. Accordingly, the Soviet Union was “constituted” in 1921–22 on a rather scrimpy rights basis. In 1936, the new Soviet Constitution proclaimed the “victory of socialism,” somewhat prematurely as it turned out. In 1978, the Soviet Union underwent yet another reconstituting. The German Democratic Republic and Viet Nam followed a similar pattern and were constitutionally revamped several times “in response to the new situation and tasks” (Viet Nam, 1992), and “in correspondence with the processes of historical development” (GDR, 1974).

The proclamatory style and unilateral declarations of program constitutions by a self-established avant-garde bear a certain resemblance to the manifesto. Interestingly enough, even contracted or legislated constitutions have preserved programmatic elements. Also, authors rejecting the idea of a European constitution have unwillingly and ironically invoked the concept of a program constitution when arguing that the Union as a “system in flux” contradicts the idea of one “ultimate document” with “rigid, immovable legal constraints.”<sup>51</sup>

Although constitutional history does not follow the path of evolution, one can discern a secular trend from manifesto and contract constitutions to the fourth archetype, the constitution as *law*, which is to say, as products of a legislative process. This sequence was first illustrated by the incorporation of the French *Déclaration* into the Revolutionary Constitution of 1791; and then by the U.S. Supreme Court’s two leading decisions establishing the Constitution as directly applicable law superior to all ordinary laws and as the basis of judicial review.<sup>52</sup> Subsequently, the worldwide proliferation of legislated constitutions during the nineteenth and twentieth centuries testifies to the impressive career of this archetype.

In sharp contrast to the other archetypes, the constitutional elites invoke people who are, after all, missing or absent as a monolithic, imaginary collective, as the *pouvoir constituant*. They claim popular sovereignty for and popular participation in constitution making as the foundational and legitimatory source: “We, the People” (of the United States) “do ordain,”

<sup>51</sup> Ulrich Everling, *Überlegungen zur Struktur der Europäischen Union und zum neuen Europa-Artikel des Grundgesetzes* [Reflections on the Structure of the European Union and the New Europe-Clause of the German Basic Law], 108 DEUTSCHES VERWALTUNGSBLATT 936, 940 (1993); C. F. Ophüls, *Die Europäischen Gemeinschaftsverträge als Planungsverfassungen* [The Treaties of the European Community as Plan-Constitutions] in PLANUNG [PLANNING] vol. I, at 229 (J. Kaiser ed., Nomos 1965).

<sup>52</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803), and *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

“We, the people of Afghanistan have adopted,” “We, the representatives of the Argentine Nation . . . do ordain,” while the French “National Assembly proclaims . . .” even as “the Chinese people of all nationalities . . . have the duty to uphold the dignity of the Constitution,” and so on. The legislated constitution qualifies as the most flexible archetype—flexible enough to incorporate the other archetypes. At times, it may be seen to imply a foundational social contract while, at others, it draws from the confessional style of manifestos and incorporates programmatic visions in the guise of the goals of the state with constitutional mandates addressed to the lawmaker, such as the promotion of women’s rights, the establishment of a welfare system, or the protection of the natural environment.

## 5. Constitutional architecture

Not only do concepts, history, and archetypes have interesting stories to tell but so, too, do the architecture and structural elements of constitutions, thus contributing to a layered narrative. The most prominent building element deals with *agency*, which constitutions invariably attribute to the individual as part of the sovereign and as a member of the body politic. Constitutions thus reveal an originally novel but today common and routinized political imagining of the subject as an active participant of social and political life, a subject who is expected to master his or her personal destiny and the problems arising from life in society. As a matter of routine, nearly all modern constitutions, translate this activist expectation (*aktivistische Zumutung*) into rights and freedoms guaranteeing private and political autonomy within an overall political scheme of self-government.<sup>53</sup> Some constitutions complement the catalogue of liberal rights with social rights and rule-of-law principles safeguarding the equal distribution of freedom.<sup>54</sup> These answers to questions of justice form the most shining building blocks of modern constitutions<sup>55</sup> and the core of constitutional ideology. They have proven immune to the various critiques of rights—namely, their

<sup>53</sup> For a theoretical account of the activist expectation and of constitutions as attributing agency, see GÜNTER FRANKENBERG, DIE VERFASSUNG DER REPUBLIK [THE CONSTITUTION OF THE REPUBLIC] 32 (Nomos 1996).

<sup>54</sup> See Günter Frankenberg, *Why Care?—The Trouble With Social Rights*, 17 CARDozo L. Rev. 1365 (1996), critically commented upon by Jürgen Habermas, *Reply to Symposium Participants*, 17 CARDozo L. Rev. 1477, 1542 (1996).

<sup>55</sup> For elaborate studies from within the liberal tradition, see JÜRGEN HABERMAS, FAKTITÄT UND GELTUNG (Suhrkamp 1992); in English BETWEEN FACTS AND NORMS (MIT Press 1996); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard Univ. Press 1977); JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press 1971). A critical survey of the liberal-communitarian criticism of the liberal tradition is provided by RAINER FORST, KONTEXTE DER GERECHTIGKEIT [CONTEXTS OF JUSTICE] (Suhrkamp 1994). See also MICHAEL WALZER, SPHERES OF JUSTICE (Basic Books 1983).

indeterminate texture, ideological content,<sup>56</sup> and possessive-individualist<sup>57</sup> connotations.

Constitutions also address questions of the good life. Signifiers for the good life in society are “common weal,” “public interest,” or “common good,” which are crystallized in the *values* derived from political or social ethics and in the corresponding *duties* considered essential for social coexistence. Prominent among constitutionally sanctioned common values are social peace, human dignity, security, friendship among nations, protection of the natural environment, and unity. Of late, solidarity, the modern version of *fraternité*, seems to have risen in the charts. It is crucial that values reside in a realm beyond the disposition of the individual and call for their authoritative enforcement from above—usually by the state. Unlike the general and universal duty to respect the rights of others, value-oriented civic duties correspond asymmetrically to rights and have a tendency to come into conflict with them. The implementation of these value-based duties transgresses the horizontal relationship among citizens-members. Rather than empowering the citizenry, they empower public authorities to execute the commands of the value order. This asymmetry is illustrated by the discourse on “human security”<sup>58</sup> in international law and, in the German constitutional context, by the “right to security” generating the state’s duty to protect the life and health of citizens.<sup>59</sup>

Compared to the glamour and fascination generated by rights catalog and the popular, if diffuse, appeal of values, regulations concerning *political organization*, which forms the third building block, seem to incite much less interpretive enthusiasm and popular excitement. Such neglect is somewhat surprising, since such regulations shape the very “constitution of politics”—the establishment, transfer, exercise, and control of political power—and, hence, directly affect the exercise and viability of rights and the rule-of-law guarantees. The organizational building stone involves practical questions of political wisdom and political risk management, all of which is embodied in

<sup>56</sup> For a radical critique of liberal rights, see the various strands of the Critical Legal Studies Movement and its successors. MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (Harvard Univ. Press 1987); PIERRE SCHLAG, LAYING DOWN THE LAW (N.Y. Univ. Press 1996); CRITICAL RACE THEORY (Kimberlé Crenshaw et al. eds., The New Press 1995); AFTER IDENTITY (Dan Danielson & Karen Engle eds., Routledge 1995).

<sup>57</sup> According to CRAWFORD BROUH MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE (Clarendon Press 1962), the possessive-individualist ethos, with its focus on negative liberty at the expense of material equality, constitutes the core contradiction of liberalism and the entrenched part of Western culture and, arguably, modernity.

<sup>58</sup> See Taylor Owen, *Human Security—Conflict, Critique and Consensus: Colloquium Remarks and a Proposal for a Threshold-Based Definition*, 18 CAMBRIDGE REV. INT'L AFFAIRS 373 (2004), with further references.

<sup>59</sup> Günter Frankenberg, *Tocqueville's Question: The Role of a Constitution in the Process of Integration*, 13 RATIO JURIS 1–30 (2000).

systems of horizontal and vertical separation and balance of powers, election rules, the distribution of legislative competences, the financial constitution, and so forth. In constitutional theory, organizational rules have often been played off against fundamental rights and vice-versa.<sup>60</sup> Quite prophetically, the authors of the *Déclaration* anticipated the necessary coexistence of both—an insight epitomized by a catalogue of rights and an organizational charter guaranteeing the separation of powers.<sup>61</sup>

The fourth component of any modern constitution deals with questions of constitutional *validity*, *amendment*, and *change*.<sup>62</sup> Although some of the relevant provisions—establishment of a constitutional court, judicial review, and amendment procedures—superficially resemble organizational regulations, they have to be distinguished as metarules or rules of *collision*. Metarules define the *pouvoir constituant* and lay down the conditions for the repeal, revision, and interpretation of a constitution, thus trying to strike a balance between the contradictory imperatives of stability and flexibility. Rules of collision determine the legal hierarchy within a legal order. They situate a constitution and a national legal regime with regard to other bodies of norms, notably to supranational and international law. Within and through metarules constitutions talk about themselves, establishing the narcissism of the small (national) difference.<sup>63</sup> They stress or even exaggerate insignificant details in addressing others, which then become of major importance and thus establish the otherness of others. Furthermore, metarules are designed to defend a constitution's dignity as “supreme law” vis-à-vis ordinary law interpretation and lawmaking by adding “interpretation in conformity with the constitution” to the canons meant to define and elicit the scientific nature of legal interpretation. Metarules operate as closure, with regard to the paradox of the constitutional moment, while keeping open the permanent discourse on legitimacy.

Comparative analysis reveals that constitutions almost everywhere share these structural properties. Such similarity at the surface, however, only

<sup>60</sup> After two hundred years of constitutional experience and debate, it is about time to put to rest this intellectually foolish, though politically dangerous, debate, since the organization of political will and decision making rather obviously determines the “worth” of those rights of political communication and participation that are meant to safeguard autonomy.

<sup>61</sup> Compare only articles 1 and 2 (inalienable rights and their protection) with article 16 (no constitution without separation of powers) of the French *Déclaration*, which shaped the French Constitution of 1791.

<sup>62</sup> See BRUN-OTTO BRYDE, VERFASSUNGSENTWICKLUNG [CONSTITUTIONAL DEVELOPMENT] (Nomos 1982).

<sup>63</sup> I borrow the concept from Freud, who held that we reserve our most virulent emotions—aggression, hatred, and envy—to direct toward those who resemble us most. We feel threatened not by the Other, with whom we have little in common, but by the “nearly-we,” who mirror and reflect us. See SIGMUND FREUD, *The Taboo of Virginity*, in *Contributions to the Psychology of Love*, 11 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 192 (James Strachey et al. eds., James Strachey trans., Hogarth 1957) (1918).

characterizes the way polities dress for their appearance on the global theatre's stage as secular and rule-of-law loving figures.<sup>64</sup> Remarkable differences come into view, if the architecture of their constitutions is not read too schematically as a result of globalization. Such differences will appear, especially, if one looks closely at the peculiar arrangements of the different building elements—at how they are designed and internally related; which of the conceptual varieties is accentuated by structure; and how certain arrangements are privileged by certain archetypes.

## 6. Conclusion

This short and programmatic article is meant to render a summary of constitutional concepts, archetypes, and architecture, thus drawing the contours of the varied layers of a more complex narrative. The next step—or, rather, reading—would lead to the question of how concepts, archetypes, and architecture may be interrelated, and which different configurations of power and popular or elitist visions of conflict and harmony they reveal. A further step would lead to the tricky question of how to deal with odd details, on the one hand, and those same constitutional concepts, archetypes, and architecture, on the other. By combining these two approaches—a deconstructive move as well as a structural account—I intend to unsettle an overly formalistic analysis and to prevent the reification of constitutional structures, types, or models as transnational and ahistorical givens. Therefore, the focus on odd details and loose ends, one might say, is not—or not only—meant to celebrate the narcissism of the small difference but to help contextualize constitution making and to capture the local, elitist, or popular fantasies, conflicts, and problems, as well as to bar the comparatist's way to all-too-easy classifications and typifications. This focus functions as methodological guerilla warfare against grand narratives—the *grands récits*<sup>65</sup>—in comparative constitutional law.

By way of summary, I want to indicate, however briefly, a few assumptions that call for further reading and writing, research and comparison. Western constitutions tend to focus on the higher-law aspect and share a preference for rights and organization. Establishing, limiting, and legitimizing political authority appears to be the main project. Decolonized societies and societies said to be founded on “Asian values” shift the accent from law to culture and from rights to values, which defines

<sup>64</sup> One might conclude that this basic architectural pattern is not Eurocentric, unless one wants to claim that (a) secularization is a strictly Western series of events and (b) European constitutionalism enslaved the minds of constitution makers in the rest of the world.

<sup>65</sup> JEAN-FRANCOIS LYOTARD, *LA CONDITION POSTMODERNE* (Minuit 1979); in English, *THE POSTMODERN CONDITION* (Manchester Univ. Press 1984).

the constitutional project as primarily bringing about social or interethnic integration. Socialist states, while paying lip service to the dimensions of law and rights, favor constitutions as cultural artifacts, as blackboards for historical narratives and programmatic messages. Transition countries, while adopting rights catalogs as obligatory identity cards for their rites of passage, most notably to the European Council or the European Union, seem to be preoccupied with problems of institution building and political authority and, therefore, concentrate on organizational regulations, as do all countries or elites that are nervous about power and its control.

Constitutional style and accent, the odd details and common structures, historical references and current conflicts, political anxieties and projects, archetypes and their selective mix, the logic of constitutional architecture as, for instance, revealed by the conscious avoidance or embrace of the “social” in rights catalogs<sup>66</sup> or the elaboration of values—all these, I submit in conclusion, may constitute some of the stuff of a post-Cinderella and post-Sleeping Beauty mode of comparative constitutional studies.

<sup>66</sup> Which is to say, abstaining from coining social rights.